UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MCDONALD'S USA, LLC, A JOINT EMPLOYER, et al.	**Cases 02-CA-093893, et al.** **04-CA-125567, et al.** **13-CA-106490, et al.** **20-CA-132103, et al.** **25-CA-114819, et al.** **31-CA-127447, et al.**
and	
FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.	

CHARGING PARTIES' MOTION FOR RECUSAL OF CHAIRMAN RING AND MEMBER EMMANUEL

Charging Parties submit this Motion for Recusal of National Labor Relations Board ("NLRB") Chairman John F. Ring and Member William J. Emmanuel following McDonald's USA, LLC's ("Respondent" or "McDonald's") August 13, 2018 Request for Special Permission to Appeal the July 17, 2018 Order of the Administrative Law Judge Denying Approval of the Settlement Agreements ("July 17 Order).

I. LEGAL STANDARD FOR RECUSAL.

NLRB members are executive branch employees bound by two sets of ethical standards: (1) the Ethics Commitments of Executive Branch Appointees set forth in Executive Order 13770 ("Executive Order 13770" or "the Trump Ethics Pledge"); and (2) the Standards of Ethical Conduct for Employees of the Executive Branch established in Title 5 of the Code of Federal Regulations.

Executive Order 13770 specifically prohibits Executive Branch employees, for a period of two years from the date of appointment, from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [her or his] former employer or former clients." Executive Order 13770, 82 Fed. Reg. 9333 (Jan. 28, 2017). A matter is

"[d]irectly and substantially related" if "the appointee's former employer or a former client is a party or represents a party." *Id.* at 9334. "Former employer" is any person "for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner." *Id.* The Code imposes the same restriction for a one-year period. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

Further, the Code requires government employees to "endeavor to avoid any actions creating the appearance of violating the law or the ethical standards set forth in this part." 5 C.F.R. § 2635.101(b)(14). An employee "should not participate" in any matter where "the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter," unless a designated agency official is informed of the appearance of the problem and gives his or her authorization. 5 C.F.R. § 2635.502(a).

II. CHAIRMAN RING HAS AN OBLIGATION TO RECUSE HIMSELF FROM CONSIDERATION OF MCDONALD'S SPECIAL REQUEST FOR PERMISSION TO APPEAL THE JULY 17 ORDER.

Prior to his appointment as Chairman of the NLRB, John Ring was a partner at the firm Morgan Lewis and employed there from 1988 until commencing service with the Board in April 2018.[1] During his Senate confirmation process Chairman Ring affirmed both in writing[2] and in response to oral questioning from Senator Warren[3] that for a period of two years from the date he

[1] *See* page 3 of Chairman Ring's Nominee Report filed with the U.S. Office of Government Ethics, 5 C.F.R. part 2634 available at: https://drive.google.com/file/d/1Qp0JrjG1_8JguezZsQEzBiNB92_X2d76/view.
[2] *See* question and answer number six contained in re-printed answers to questions from Ranking Member Pat Murray (March 1, 2018) available at: https://www.law.com/nationallawjournal/2018/03/07/inside-a-morgan-lewis-partners-new-conflicts-disclosures-for-nlrb-post/?slreturn=20180708171037.
[3] *See* https://www.c-span.org/video/?c4744098/john-ring-nlrb-testimony-recusal-promise.

signed the Trump Ethics Pledge he would refrain from participating in any matter that comes before the Board where Morgan Lewis represents or represented a party.

The record created at trial before ALJ Esposito in this case contains crucial, undisputed evidence concerning the role of Chairman Ring's former law firm Morgan Lewis in assisting McDonald's in combating the Fight for $15 campaign—the very basis for issuance of the Consolidated Complaint against the Respondents in this action. In particular, McDonald's retained Morgan Lewis to create a national, system-wide training program for McDonald's franchisees and their managers in response to union organizing and protected, concerted activity by the Fight for $15 campaign. From April 2013 through December 2014 at least 237 such trainings were held nationwide. Participants in that training—including the Respondents in this action—were required to sign a common legal interest agreement with Morgan Lewis prior to receiving training.[4]

Thus, Morgan Lewis was paid by McDonald's to provide legal training to the Respondent Franchisees regarding how to address labor relations issues in their respective restaurants during the throes of the union organizing campaign forming the predicate factual backdrop of this case. Indeed, the evidence concerning this undertaking is an important part of the General Counsel's affirmative case on the joint employer status of McDonald's and the Respondent Franchisees in this proceeding. Chairman Ring must, therefore, recuse himself from consideration of any appeal to the Board in connection with this case.

[4] *See*, *e.g.*, Tr. 1863, 1866-68, 6565-69; G.C. Ex. HR 94, 94.1, 204, 369, 526, 528, 550; Tr. 12677-78, 15296-98, 16701-02, G.C. Ex. HR 800.2 (New York); Tr. 3007-09, 3018-20, 3046-47, 3049-55, 3064-68, 3071, 3120-30, 3138-39, 3145, 10415-17, 10437, 12936-37, G.C. Ex. BC 176, HR 605.1, 605.2, 605.3, 605.4, 605.5, 608.1, 642, 649, 654, 655, 825 (Chicago); Tr. 2104-07, 2011-14, 2164-65, 2285-88, G.C. Ex. HR 369, 370, 394 (Indianapolis); Tr. 3508, 3514-15, 3518-21, 3523-26, 3536, 3549-50, 10466, G.C. Ex. HR 303, 304, 304.1-304.4, 305, 307, 321, 395, 396, 846 (Sacramento); Tr. 4065, 13001-02, 13004, 13331-33, G.C. Ex. BC 1950, HR. 526 (Los Angeles).

We note that on June 8, 2018, in the wake of the widely publicized ethics investigations and recusal disputes arising from the *Hy-Brand* and *BFI* joint employer litigation (*see, e.g.*, *Hy-Brand Indus. Contractors Ltd.*, 366 NLRB No. 26 (Feb. 26, 2018) ("*Hy-Brand II"*), and *Hy-Brand III*, cited at n.11, *infra*), and while the ALJ was considering the contested settlements proposed in this *McDonald's* joint employer case, Chairman Ring publically announced that he would spearhead an expeditious review to examine every aspect of the Board's current recusal practices in light of the statutory, regulatory, and presidential requirements governing those practices.[5] The expressed need of the Chairman to restore public confidence in the impartiality of the Board, coupled with his own ethics pledge to refrain from participating in any case for two years in which his former firm represented a party, further underscores the imperative for Chairman Ring to recuse himself. Given extensive record evidence of Morgan Lewis' direct involvement in this case and the facts underlying the dispute, a reasonable person with knowledge of those facts would question Chairman Ring's impartiality in ruling on any appeal (or other filing) in connection with this case, *see* 5 C.F.R. § 2635.502(a), thus making such participation a violation of 5 C.F.R. § 2635.101(b).

III. MEMBER EMANUEL HAS AN OBLIGATION TO RECUSE HIMSELF FROM CONSIDERATION OF MCDONALD'S SPECIAL REQUEST FOR PERMISSION TO APPEAL THE JULY 17 ORDER.

Prior to appointment to the NLRB, Member Emanuel was a shareholder with the firm of Littler Mendelson.[6] Like Morgan Lewis, Littler Mendelson was counsel to McDonald's and its

[5] *See* "NLRB to Undertake Comprehensive Internal Ethics and Recusal Review" (June 8, 2018) (emphasizing that "[t]his initiative will ensure that the NLRB's stakeholders—and the American people generally—can have full confidence in the integrity of the Board and its recusal processes") available at: https://www.nlrb.gov/news-outreach/news-story/nlrb-undertake-comprehensive-internal-ethics-and-recusal-review.

[6] *See* Emanuel to Ketcham (agency ethics officer), June 30, 2017, available at: http://altgov2.org/wp-content/uploads/Emanuel-William-finalEA.pdf?7ba951&7ba951.

franchisees in connection with this case. McDonald's admittedly contracted with Littler Mendelson to provide a national labor relations hotline for McDonald's franchisees (and their own personnel) to call and speak with a Littler Mendelson attorney to get answers to their questions about the Fight for $15 union activity.[7] McDonald's specifically retained Littler Mendelson to operate the hotline for Respondent Franchisees in order to provide them with free legal guidance in formulating a response to the union organizing that gave rise to the ULPs in this case. Here, again, this undertaking is an integral fact concerning a substantive issue in this case—McDonald's role as a joint employer and its responsibility in connection with ULPs arising from the response to the union's campaign. Member Emanuel is, therefore, barred from participating in a decision on whether to grant the instant Special Request for Permission to Appeal (and from participating in any other proceedings before the Board in this case).

The Code and the Executive Order require that Member Emanuel recuse himself from this case on the grounds that Littler Mendelson served as counsel to a party and Member Emanuel was a shareholder there within the past two years. Moreover, Member Emmanuel was a former partner at the law firm of Jones Day,[8] which is counsel of record to McDonald's in this case and has served as its primary counsel from the inception of the case. Thus, in addition to the rationale for recusal based on Member Emmanuel's association with Littler Mendelson, his former relationship with primary counsel in this case also raises the specter of partiality toward Respondents. Member Emmanuel is directly associated with two law firms involved in the representation of Respondents, including the very circumstances giving rise to the case. The

[7] *See* GC Ex. HR 83, 753, 382, 640 and HR 74 (flyer adverting the Littler hotline states "Get Quick Answers to Basic Questions about Labor Law and Access Rights/Limits" and indicates that calls to Littler are free for McDonald's franchisees who may have questions about the union's solicitation efforts); Tr. 1880-82, 1935-36, 2179-80, 2913-15, 6789-90.
[8] *See* Emanuel to Ketcham (agency ethics officer), June 30, 2017, available at: http://altgov2.org/wp-content/uploads/Emanuel-William-finalEA.pdf?7ba951&7ba951.

governing rules of ethics bar him from participation in rendering a decision in the Special Request for Permission to Appeal the July 17 Order. Because these circumstances "would cause a reasonable person with knowledge of the relevant facts to question [Member Emmanuel's] impartiality" in ruling on any appeal filed in connection with this case, *see* 5 C.F.R. § 2635.502(a), his participation is foreclosed by 5 C.F.R. § 2635.101(b).

IV. RECUSAL IS NECESSARY EVEN THOUGH MORGAN LEWIS AND LITTLER MENDELSON ARE NOT COUNSEL OF RECORD.

Chairman Ring and Member Emmanuel must be recused from this matter even though Morgan Lewis and Litter Mendelson did not appear as counsel of record in this case. Although the newly appointed General Counsel seeks to settle this case on bargain-basement terms—which McDonald's now requests this Board to review—Counsel for the General Counsel spent three years constructing a carefully reasoned case and introducing compelling evidence of McDonald's role as a joint employer with its franchisees. The record is full of evidence concerning McDonald's role in formulating a coherent strategy in coordinating its franchisees' response to the Fight for $15 campaign.[9] Judge Esposito noted that the General Counsel introduced "a significant quantum of evidence" intended to show that pursuant to *Capitol EMI Music, Inc.*, 399 NLRB 997, 1000 (1993) McDonald's and the Franchisee Respondents "perceive[d] a mutual interest in warding off union representation" of employees at the Respondent Franchisee locations.[10] As noted above, at least two significant pieces of that evidence concern the direct involvement of the law firms Littler Mendelson and Morgan Lewis.

Even though Chairman Ring and Member Emmanuel's respective law firms are not counsel of record in this matter, those firms were retained by McDonald's to be directly involved

[9] *See* July 17 Order at 33-36.
[10] *See* July 17 Order at 36.

in the underlying dispute. With respect to Morgan Lewis, that involvement was so integral to the matter presently before the Board that Respondent Franchisees were required to sign joint-defense agreements with Morgan Lewis in recognition of their role as counsel in this very case. No reasonable person with knowledge of the role Morgan Lewis and Littler Mendelson played in combating the Fight for $15 campaign could ignore their admitted service as counsel to McDonald's in this case. Chairman Ring and Member Emmanuel should err "on the side of protecting [the Board's] reputation for integrity and impartiality"[11] by recusing themselves from consideration of any appeal taken in connection with this case.

CONCLUSION

There is sound justification for recusal of Chairman Ring and Member Emmanuel based on the representation their former firms provided to Respondent McDonald's and the Franchisee Respondents in this case. The direct involvement of their respective firms in the circumstances giving rise to the case presents a unique situation that demands recusal. For all the foregoing reasons, the Charging Parties request that Chairman Ring and Member Emmanuel recuse themselves from determination of McDonald's Special Request for Permission to Appeal the July 17 Order Denying the Motion to Approve the Settlements.

August 14, 2018

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[11] *See Hy-Brand Indus. Contractors Ltd.*, 366 NLRB No. 93, at Slip Op. *4 (June 6, 2018) ("*Hy-Brand III*") (separate concurrence by Chairman Ring and Member Kaplan in response to motion for reconsideration in *Hy-Brand II*, explaining that if there was mistake in the decision to recuse Member Emmanuel from participating in *Hy-Brand II*, it was a "well intentioned" error benefiting the reputation of government).

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CERTIFICATE OF SERVICE

I, Kathy K. Krieger, affirm under penalty of perjury that on August 14, 2018, I caused a true and correct copy of the foregoing letter to Charging Parties' Motion for Recusal of Chairman Ring and Member Emmanuel to be filed electronically filed with the Division of Judges of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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